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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

CHARLES H KEATING, JR., former Chairman of the Board of LINCOLN SAVINGS AND LOAN ASSOCIATION, a California Corporation, and JAMES J. CLANCY,

Petitioners,

vs.

CINEMA 7, INC., a California Corporation; PHILIP BRADY; and DOES 1 through 20, inclusive,

Respondents.

PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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In Propria Persona for
Petitioner James J. Clancy
Counsel of Record.

QUESTION PRESENTED

I

Whether it was a denial of due process of law for the California Supreme Court to deny the Motion of the "pro bono" attorney of record to be substituted as a private attorney general in place of the FDIC which, as the successor in interest to Lincoln Savings and Loan, had declared its intention to abandon Lincoln's appeal of important public interest questions; namely, whether the Orange County Superior Court erred in dismissing Lincoln's public nuisance (obscenity) abatement and unlawful trade practice (dealing in obscenity) lawsuits and awarding sanctions in the amount of $12,778.84 to the Mitchell Brothers' Santa Ana Porno Theatre?

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IN THE

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OCTOBER TERM, 1989

CHARLES H KEATING, JR., former Chairman of the Board of LINCOLN SAVINGS AND LOAN ASSOCIATION, a California Corporation, and JAMES J. CLANCY,

Petitioner,*

vs.

CINEMA 7, INC., a California Corporation; PHILIP BRADY; and DOES 1 through 20, inclusive,

Respondents.

PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Petitioner James J. Clancy, as the "pro bono" attorney of record in the underlying consolidated appeals of case No. G005740 and G006495, respectfully

*Chief Deputy Clerk Francis J. Lorson's letter of March 28, 1990 suggests that the caption should read "Clancy v. Cinema 7, Inc. et al." instead of "Lincoln Savings and Loan Association, a California Corporation v. Cinema 7, Inc. et al." Charles H Keating, the former Chairman of the Board who authorized the filing of the lawsuit below, has requested that his name be added to the caption of this Petition as a real party in interest.

prays that a writ of certiorari be issued to the Supreme Court of the State of California, to review its order of December 20, 1989, which denied Petitioner's request that he be substituted as a private attorney general in place of plaintiff and appellant Lincoln Savings and Loan, after the FDIC, as successors in interest to Lincoln Savings and Loan, had declared its intention to abandon Lincoln's appeal of important questions of public interest which were presented in the consolidated appeals from the judgment of the Orange County Superior Court which dismissed Lincoln's public nuisance (obscenity) abatement and unlawful trade practice (dealing in obscenity) lawsuits (appeal in Case No. G005740) and awarded sanctions (appeal in Case No. G006495) in the amount of

$12,778.84, to the Mitchell Brothers Santa Ana Porno Theatre.

JURISDICTION

The opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division Three, in the consolidated appeal of Case No. G005740 and G006495, from the judgment in Lincoln Savings and Loan's private attorney general lawsuit was filed on August 24, 1989. (See copy of opinion at Appendix A-1 through A-50). A motion for an order authorizing a substitution of James J. Clancy, the "pro bono" attorney of record, as party plaintiff and appellant, for Lincoln Savings and Loan, after the FDIC as successor in interest to Lincoln Savings and Loan had announced its intention to abandon the appeal to the California Supreme court,

was filed on October 3, 1989. On December 20, 1989, the California Supreme Court filed its order denying the motion for an order authorizing a substitution of parties in Lincoln's consolidated private attorney general lawsuit. This petition for certiorari was filed within 90 days from the date the California Supreme Court judgment (order) in the case became final.

STATUTORY PROVISIONS INVOLVED

California Civil Code sections 3479, 3480, 3491, 3493, 3496; California Code of Civil Procedure sections 731, 1021 and 1021.5; California Penal Code Sections 311(a), 370-373a; Business and Professions Code sections 17204, 17535; First and Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

A.

THE COMPLAINT OF LINCOLN SAVINGS AND LOAN IN THE TRIAL COURT BELOW IN CASE NO. G005740 ALLEGES A CLASSIC EXAMPLE OF A PRIVATE ATTORNEY GENERAL LAWSUIT

The underlying appeal by Lincoln Savings and Loan Association, a California Corporation (hereinafter also, "Lincoln") in Case No. G005740 is from a Judgment of the Orange County Superior Court sustaining the defendants' demurrer and dismissing its private attorney general lawsuit against the Mitchell Brothers Theater in Santa Ana on the grounds that "Lincoln" lacks "standing" to bring a private attorney-general lawsuit; and from the order of Commissioner Cimbaluk denying Lincoln's application for an order to

show cause why a preliminary injunction should not issue in this case against the exhibition of three films; and from the order of Judge Gary Taylor which denied Lincoln's ancillary motions for a preliminary injunction against the exhibition of 57 motion picture films and for an order requiring the production of six (6) prints of films used to exhibit the same which were named in two subpoenas duces tecum. Except for the specific films which are being challenged as obscene in Case No. G005740, the first, second and fourth causes of action are identical to the first, second and third causes of action in People ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater et al, Case No. 45-80-37 which was abandoned by the City after the Defendants' demurrer had been overruled and their motion to

strike denied. (Statement of Compliance with Local Law and Motion Rule 504, filed October 1, 1987 at page 2 lines 14-28.)

B.

THE OPERATIONS OF THE MITCHELL BROTHERS THEATER IN SANTA ANA INVOLVE THE EXHIBITION OF OPEN AND NOTORIOUS HARD-CORE PORNOGRAPHY

In September of 1975, James Lloyd and Artie Mitchell, residents of Northern California and operators of the hard-core pornographic O'Farrell Theater in San Francisco [See, also Mitchell et al. v Superior Court 42 Cal 3d 1300, Jan. 2, 1987, rehearing granted March 26, 1987, contempt judgment annulled in 49 Cal.3d 1230 (December 28, 1989)], expanded their chain of pornographic theater operations to Southern California and commenced exhibiting

"hard-core pornography" at the Mitchell Brothers Theater in Santa Ana, located across the street from Lincoln Savings and Loan Association and Santa Ana Junior College. In subsequent depositions and in testimony in state and federal lawsuits, both James and Artie Mitchell openly admit and, indeed, boast that they specialize in and exhibit only "hard-core pornography".

Lincoln's evidence, obtained from continuous weekly surveillances of the films being exhibited at the theater (by the City and subsequently, by Lincoln Savings and Loan) during the entire 12 year period from September of 1975 to the date of filing its private attorney general lawsuit, established proof that the theater has, in fact, exhibited nothing but "hard-core pornography" during that period. A portion of that

proof, in the form of time and motion studies and declarations and video tapes of 57 films in a 19 week period, which was marshalled by Lincoln after the City abandoned its lawsuits, were filed with the trial court below. See appendix at page 1908-1909.

Some of the facts herein stated are of record in the numerous public nuisance abatement lawsuits filed by the City of Santa Ana against the Mitchell Brothers Theater. Petitioner requests this Court to take judicial notice of the following opinions and facts therein established of record: People of the State of California ex rel. Gow v. Mitchell Brothers' Santa Ana Theater et al. 101 Cal App 3d 296, 161 Cal Rptr. 562 (Jan. 22, 1980), (prel. inj.). People of the State of California ex rel. Gow v. Mitchell Brothers' Santa Ana

Theater et al. 118 Cal App 3d 863, 173 Cal Rptr 476 April 16, 1981. (prel. inj.); People ex rel. Gow v. Mitchell Brothers' et. al., 114 Cal App 3d 923, 171 Cal Rptr 85 (Jan. 20, 1981); reversed in California ex rel. Edward Cooper v. Mitchell Brothers' Santa Ana Theater, et al., 454 U.S. 90, 70 L. Ed. 2d 262 (Nov. 30, 1981); People ex rel. Edward Cooper v. Mitchell Brothers' Santa Ana Theater, et al., 128 Cal App 3d 937, 180 Cal Rptr. 728 (Feb. 18, 1982) (decision on remand) and People ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater, 165 Cal App 3d 378, 211 Cal Rptr 501 (Mar. 7, 1985) (decision on attorney's fees on appeal); Jartech Inc. et al. v. Clancy et al. 666 F 2d 403 (Jan. 25, 1982) (copyright lawsuit).

C.

THE JUDGEMENTS AWARDED THE CITY OF SANTA ANA IN THEIR PUBLIC NUISANCE ABATEMENT LITIGATION AGAINST THE MITCHELL BROTHERS' THEATER DURING THE ELEVEN YEAR PERIOD FROM NOV. 1976 THROUGH DEC. 1987 ESTABLISH THE CORRECTNESS OF THE UNDERLYING LAWSUIT

On June 1, 1987, the California Supreme Court decided People ex rel. Busch v. Projection Room Theater et al 17 Cal 3d 42 at 53, 130 Cal Rptr 328, expressly holding that the exhibition of obscene films constituted a public nuisance, properly subject to abatement, and that the "public nuisance laws may properly be employed to regulate the exhibition of obscene materials to consenting adults." Thereafter, the City of Santa Ana expanded upon Busch and enacted a municipal ordinance under express power given to it by Government Code Section 38771 which holds, among other things, that a place which

exhibits nothing but obscene motion picture films makes the real estate itself a public nuisance which may be reformed and abated under the public nuisance laws (both common law and statutory).

During the eleven year period from Nov. 1976 through December of 1987, the City of Santa Ana and its taxpayers underwrote the expense of public nuisance abatement litigation, in an effort to abate the continuous, uninterrupted, daily exhibitions of obscene films at the Mitchell Brothers' Theater in Santa Ana. All of the films which have been adjudicated in those lawsuits --51 films of 60 to 90 minutes duration and 8 previews --were held to be hard-core pornography and unlawful under California law. Further, at the time that Lincoln authorized the filing

of a private-attorney general lawsuit, an additional 42 public nuisance abatement lawsuits filed by the City of Santa Ana in 1985 and 1986 were awaiting trial on the merits, after having withstood lengthy pre-trial attacks by the defendants.

As a part of the above litigation, the City repeatedly sought a final, definitive answer from the California Supreme Court and from this Court on two legal questions: whether it had the power under the federal constitution (1) to declare the real estate, upon which a theater was continuously exhibition nothing but obscene films, to be a public nuisance, and (2) whether, under such ordinance, the remedy of "closure" of the premises for "public nuisance" could be applied to real estate which had been judicially determined to have

continuously exhibited obscene films for a 11 year period, and to be such a public nuisance. In those eleven years of litigation, both the California Supreme Court and this Court avoided resolving those two issues in their reported decisions. In exasperation arising out of the unwillingness of either of those Courts to definitively address those two issues in the context of the City's monetary problem, the City of Santa Ana in March of 1987 publicly announced its intentions to abandon that litigation, and to compromise the pending lawsuits by entering into a settlement agreement with the Mitchell Brothers' Theater under which the Mitchell Brothers would be permitted to continue exhibiting obscene films.

D.

LINCOLN SAVINGS AND LOAN'S ALLEGATION

AND PROOF OF "ABANDONMENT" OF THE PUBLIC NUISANCE ABATEMENT LITIGATION ON THE PART OF THE CITY OF SANTA ANA, ESTABLISHES "STANDING" AS A MATTER OF LAW AND THE RIGHT TO ACT AS A PRIVATE ATTORNEY-GENERAL

On March 25, 1987, the Board of Directors of Lincoln Savings and Loan acted by Resolution to authorize the filing of a private attorney-general lawsuit. That Resolution was supported by the following findings of fact, in support of its claim of "non-feasance" on the part of the City in its performance of a duty entrusted to the City:

> WHEREAS, the above mentioned Lincoln Savings and Loan Association branch office is located across the street from a motion picture theatre known as the MITCHELL BROTHERS' SANTA ANA THEATRE, located at 1565 W. 17th Street in the City of Santa Ana, County of Orange, California, and said theatre regularly exhibits hard-core pornography as its only course of business; and

WHEREAS, the City of Santa Ana has for the past eleven years sought to enjoin the exhibition of such obscene motion pictures, and abate the same as a public nuisance and unfair trade practice, and to that end has filed numerous lawsuits against said theater for the abatement of public nuisances and unfair trade practices and all of the films which have been adjudicated, in the court trials to date, being 51 films of 60 to 90 minutes duration and 8 previews, have been adjudicated to be hard-core pornography and unlawful under California law; and

WHEREAS, the City Attorney and City Council of the City of Santa Ana who have been given legal standing by the legislature, and are entrusted with the legal responsibility of abating such moral public nuisances under the law, have publicly announced that they are about to abandon proceeding with the 42 pending public nuisance abatement lawsuits to abate the public nuisances which are alleged to have occurred at said theatre during the period from May of 1985 through December of 1986, which allegations have been upheld against all legal challenges by the defendants to date, and which lawsuits are presently awaiting assignment to a trial court for a hearing on a preliminary injunction;

The above findings are fully supported by the allegations and declarations filed in the trial court setting forth the history of the eleven years of litigation between the City of Santa Ana and the Mitchell Brothers' Theatre and the abandonment of such litigation. See appendix at pages 95 and 1936.

E.

THE RIGHT OF ORGANIZED SOCIETY TO PROSCRIBE OBSCENITY IS A "NATURAL LAW" RIGHT, INHERENT IN MAN AND A PART OF OUR COMMON LAW HERITAGE. CIVIL CODE SECTION 22.2 REQUIRED THE TRIAL COURT TO APPLY THAT COMMON LAW PRINCIPLE AND PRECLUDED THE TRIAL COURT FROM APPLYING THE UTILITARIAN REASONING IT ENGAGED IN.

The refusal of Commissioner Cimbaluk to recognize the "standing" of Lincoln Savings and Loan to prosecute the private attorney general lawsuit to enjoin the exhibition of obscene motion picture films, upon the abandonment of

42 public nuisance abatement lawsuits by the City of Santa Ana (notwithstanding all 42 had successfully survived all of the Defendants' pre-trial attacks and the trial court had adjudicated that they were ready for trial on the merits), flies in the face of the determination by this Court in Roth v. U.S., 345 U.S. 476 that the right of organized society to proscribe obscenity is a "natural right" inherent in all men in all societies. The "universal judgment" which the majority of the U.S. Supreme Court addressed itself to in Roth is nothing less than the "immutable law of nature" acknowledged by all great philosophers and common law judges from the dawn of western civilization.

The law in California is clear that the exhibition of an obscene film is "irreparable harm" and that, therefore,

the People have an absolute right to a preliminary injunction against the exhibition of obscene motion picture films. People ex rel Gow v. Mitchell Brothers' Santa Ana Theater et al 118 Cal App 3d 863 at 871, 173 Cal Rptr 476 at 479 (April 16, 1981). It was an abuse of discretion in Case No. G005740 for Commissioner Cimbaluk to deny the application of Lincoln Savings and Loan for an order to show cause why such films should not be enjoined as obscene, and for Judge Gary Taylor to refuse to grant Lincoln's application for a preliminary injunction and for an order requiring the 35mm prints of the films which were named in the subpoena duces tecum to be produced by the defendants as the "best evidence" at the hearing on the preliminary injunction to enjoin a moral public nuisance and an unlawful

trade practice.

F.
THE CONSOLIDATED APPEAL RE ATTORNEY'S FEE AND SANCTIONS IN CASE NO. G006495

The consolidated appeal by Lincoln Savings and Loan Association in Case No. G006495 is from the order of Commissioner Julian Cimbaluk, filed January 15, 1988, which found: (1) that the Defendants, CINEMA 7, INC., et al., who are operators of the Mitchell Brothers Santa Ana Theatre, were the prevailing party in the trial court below and were entitled to "costs" under CCP Section 1032 of $578.40; (2) that the Defendants had satisfied the conditions for an award of attorney's fees pursuant to CCP Section 1021.5, and were entitled to an award of $12,778.84; and (3) that the Plaintiffs bringing and prosecution of its private attorney

general's lawsuit to enjoin and abate the Defendants' continuing course of conduct of exhibiting hard core pornographic films at the Mitchell Brother Santa Ana Theater, as a public nuisance and an unlawful trade practice, was frivolous, dilatory, and bad faith conduct within the meaning of Civil Procedure Code Section 128.5, and that the Defendants were entitled to sanctions of $12,778.84.

In the appeal from the underlying Judgment of the Orange County Superior Court, which provided the foundation for Commissioner Cimbaluk's order, in Lincoln Savings and Loan Association, a California Corporation vs. Cinema 7, Inc., a California Corporation; Philip Brady; and Does 1 through 20, inclusive, Case No. G005740, Lincoln Savings and Loan Association had contended that the

underlying Judgment of the Orange County Superior Court which dismissed its private attorney general lawsuit against the Mitchell Brother's Santa Ana Theatre on the grounds that it lacked "standing' to bring a private attorney general lawsuit; and which denied Lincoln's application for an order to show cause why a preliminary injunction should not issue against the exhibition of three films; and which denied Lincoln's ancillary motions for a preliminary injunction against the exhibition of 57 motion picture films and for an order requiring the production of six (6) prints of films which were named in two subpoena duces tecum, was erroneous and must be reversed because:

(A) Plaintiff's First Amended complaint to enjoin and abate a public nuisance and to enjoin an

unlawful trade practice alleges a classic example of the type of private attorney-general lawsuit which was analyzed by the California Supreme Court in Serrano vs. Priest 20 Cal.3d 25 (1977);

(B) The operations of the Mitchell Brother's Santa Ana Theater involve the continuing exhibition of open and notorious and unlawful hard-core pornographic motion picture films;

(C) The final judgments of obscenity against 51 motion picture films awarded the City of Santa Ana in their public nuisance abatement litigation against the Mitchell Brothers' Theater during the eleven year period from November 1976

through December 1987 establish the validity of the allegations of the underlying action;

(D) Lincoln Savings and Loan's allegation and proof of "abandonment" of the public nuisance abatement litigation on the part of the City of Santa Ana without just cause establishes "standing" as a matter of law, and their right to act as a private attorney-general; and

(E) The right of Plaintiff, as a member of organized society, to proscribe obscenity is a "nature law" right, inherent in man and a part of our common law heritage which, under the mandate of Civil Code Section 22.2, must be

enforced, and precluded the trial court from applying the utilitarian reasoning it engaged in.

In the consolidated appeal (Case No. G006495), Lincoln Savings and Loan Association contended that the Defendants were not entitled to costs under CCP Section 1032, or to attorney's fees under the private attorney-general doctrine or CCP Section 1021.5, or to sanctions under CCP 128.5 because the underlying Judgment of the Orange County Superior Court which provided the foundation for Commissioner Cimbaluk's order, which was also on appeal in Case No. 005740, was erroneous and must be reversed. As a consequence of that reversal, the Plaintiff would then become the prevailing party in the trial court below.

Lincoln Savings and Loan Association also contended that the Defendants were not entitled to attorney's fees, in that an award of attorney's fees under the private attorney-general doctrine is a matter of equity, which requires an exercise of equitable judicial discretion; that Commissioner Cimbaluk's award of attorney's fees flies in the face of rudimentary equitable principles and constitutes a gross abuse of equitable judicial discretion under these trial facts, where: (1) the judgment of dismissal is a "technical" procedural dismissal based upon lack of "standing" to prosecute the public nuisance abatement cause of action which is alleged by Lincoln Savings and Loan Association; (2) Lincoln's cause of action is identical to the City of Santa

Ana's verified complaint in Case No. 45-80-37, which alleges the Defendants have maintained a continuing course of conduct and a continuing moral public nuisance of more than 10 years duration, which has withstood all pretrial attacks by the Defendants by demurrer and motion to strike and is invulnerable to further legal attack on the grounds of collateral estoppel; (3) Lincoln's allegations establish that the City of Santa Ana, without just cause, has abandoned Case No. 45-80-37 by filing an administrative dismissal which does not evoke res judicata principles, and without having performed its duty to abate the moral public nuisance alleged in the City's verified complaint; (4) the declaration of James J. Clancy provides proof of 51 judgments of obscenity in support of such verified

complaint; (5) the declarations of Robert McGuire, and the autoptical evidence appearing in the time and motion studies which are incorporated by reference in such Declarations, establish that said moral public nuisance of exhibiting hard core pornography presently exists and is continuing at the present time; and (6) the test applied and equitable discretion exercised by Commissioner Cimbaluk in making such awards, flies in the face of the special equitable rule which has been established for private attorney-general fee award cases in which the Plaintiff is unsuccessful.

Lincoln Savings and Loan Association also contended that the Defendants were not entitled to an attorney's fee award because they have not established "the enforcement of an

important right affecting the public interest" or fulfilled the requirements for an award pursuant to Civil Code of Procedure Section 1021.5, which provides in part,

> "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any."

Woodland Hills Residents Association Inc., et al., vs. City Council of Los Angeles, (1979) 23 Cal.3d 917; 154 Cal.Rptr. 503.

Further, for all of the above reasons, an award of sanctions under Civil Code of Procedure, Section 128.5

was also clearly not authorized.

On appeal, the Court of Appeal, Fourth Appellate District, Division Three, affirmed that part of the trial court's judgment which dismissed the lawsuit and granted sanctions, but reversed the award of attorney's fee. See copy of opinion at Appendix A-1 through A-50.

After Lincoln Savings and Loan Association had perfected the consolidated appeals and the appeals had been submitted for decision after oral argument, but before the decision had been rendered, the FDIC took over control of the Lincoln Savings and Loan.

On September 27, 1989, James J. Clancy, as attorney of record for plaintiff and appellant, received the following communication from M. Virginia Novak, Corporate Counsel for Lincoln

Savings:

"Re: Lincoln Savings and Loan Association vs. Cinema 7, Inc. et al.

"Dear Mr. Clancy:

"As you are well aware, Lincoln Savings and Loan is no longer a California state chartered savings and loan but has recently become a federal chartered savings and loan association under the control and management of the FDIC and more recently has been put into a receivership. As a result of these significant changes of circumstances, Lincoln has no desire to continue to proceed in the above-referenced lawsuit. Accordingly, by this letter we are directing you to remove Lincoln Savings and Loan Association as the named party in this lawsuit and to provide documentation to us indicating that Lincoln's withdrawal has been appropriately ordered by the court.

"Thank you for your prompt attention to this matter.

"Very truly yours,

"/s/ M. Virginia Novak
Corporate Counsel"

Pursuant to said directive, Petitioner James J. Clancy moved the California Supreme Court, as attorney of record for plaintiff and appellant, for an order allowing the withdrawal of Lincoln Savings and Loan Association, as plaintiff and appellant, in the private attorney general lawsuit, entitled: Lincoln Savings and Loan Association, a California Corporation v. Cinema 7,Inc., a California Corporation; Philip Brady; and Does 1 through 20, inclusive, and concomitantly, further moved the Court, as a moving party in his own stead, for an order substituting James J. Clancy as a plaintiff and appellant in place of Lincoln Savings and Loan Association in said private attorney general lawsuit, for the prupose of achieving a final resolution of the important questions of public interest which were before the

California Supreme Court for settlement.

On November 21, 1989, the California Supreme Court filed an order reading:

> "Appellant's petition for review denied. The request for an order directing publication of the opinion is denied."

On December 2, 1989, Petitioner James J. Clancy filed a Petition for Rehearing for a clarification of its order dated November 21, 1989, reading:

> "Lincoln Savings and Loan Association (hereinafter "Lincoln"), the plaintiff and appellant in the Court of Appeal below, did not file a petition for review in this Court; instead its attorney of record, James J. Clancy, filed with this Court a pleading requesting that Lincoln be removed and that he be substituted in place of Lincoln as the plaintiff and appellant, and that the Court grant a Petition for Review, either on its own motion or on behalf of the substituted party."

Thereafter, on December 20, 1989,

the California Supreme Court filed an order reading:

> "Upon the request for clarification of order by James Clancy, this Court's order of November 21, 1989 is hereby modified to provide as follows: 'The motions, applications, and/or petitions of James Clancy and each of them are DENIED. The request for an order directing publication of the opinion is denied.'"

REASONS FOR GRANTING INTERVENTION AND THE WRIT OF CERTIORARI

I

THE EQUITY PRINCIPLES UNDERLYING THE PRIVATE ATTORNEY GENERAL CONCEPT AT THE TRIAL LEVEL SUPPORT THE FILING AND GRANTING OF THIS PETITION FOR WRIT OF CERTIORARI HEREIN AT THE APPELLATE LEVEL

The equity principles underlying the modern private attorney-general concept, which authorize the filing of a lawsuit to "vindicate a policy which is considered to be of the highest priority," see County of Inyo v. City of

Los Angeles, 78 Cal.App.3d 82 at 89, fn.1, 144 Cal.Rptr. 71, at 75 fn.1, Newman v. Piggie Park Enterprises, 390 U.S. 400 at 401, fn.2, should apply with equal force at the appellate level so as to authorize this filing of a petition for Writ of Certiorari, as a private attorney general, where such filing will "vindicate a policy which is considered to be of the highest order."

Petitioner has standing under Rule 20.4 to seek review because he was a party in intervention below, based upon the California Supreme Courts consideration of his motion and petition for rehearing. Difani v. Riverside County Oil Co. (1927) 201 Cal. 210, 214; 6 Witkin California Procedure (3d Ed.) at page 329; Rule 20,4 of the Rules of the United States Supreme Court; 28 U.S.C. section 1257(3). See Stern,

Gressman and Shapiro, Supreme Court Practice (6th Ed.) at page 47, fn.14.

Alternatively, this Court should consider this Petition as a Petition for Intervention in this Court, to correct the miscarriage of justice herein.

II

THE 12 YEAR RECORD IN THE CALIFORNIA MITCHELL BROTHERS LITIGATION DURING THE PERIOD 1975-1987 FLIES IN THE FACE OF CHIEF JUSTICE WARREN'S OBSERVATION IN JACOBELLIS V. OHIO THAT "IF CASES WERE WELL PREPARED AND WERE CONDUCTED WITH THE APPROPRIATE CONCERN FOR CONSTITUTIONAL SAFEGUARDS, COURTS WOULD NOT HESITATE TO ENFORCE THE LAWS AGAINST OBSCENITY."

In Jacobellis v. Ohio, 378 U.S. 184, Chief Justice Warren made the following observation concerning this Court's public policy in relation to obscenity, at page 202:

> "There has been some tendency in dealing with this area of the law for enforcement agencies to do only that which is easy to do -- for instance, to seize and destroy books

> with only a minimum of protection. As a result, courts are often presented with procedurally bad cases and, in dealing with them, appear to be acquiescing in the dissemination of obscenity. But if cases were well prepared and were conducted with the appropriate concern for constitutional safeguards, courts would not hesitate to enforce the laws against obscenity."

In 12 years of litigation with the Mitchell Brothers Santa Ana Theatre, Petitioner has reason to dispute the above quotation as being accurate.

In sum, an outline of the history of the California Court's performance in the Mitchell Brothers litigation during the 12 year period requires a contrary conclusion:

1. In 1976, the Orange County Superior Court refused to hear the public nuisance abatement lawsuit as a single continuing public nuisance abatement lawsuit in which the City

would have the opportunity to prove in one lawsuit that all of the films which were being exhibited were hard-core pornography. Instead, the court required that there be a cut-off date regarding the subject matter, and that the action, originally filed as a single case, be split-up and heard in a series of abatement lawsuits.

2. In 1981, the Court of Appeal ruled in People ex rel. Gow v. Mitchell Brothers' Santa Ana Theatre et al., 118 Cal.App.3d 863 at 871 that the People have an absolute right to a preliminary injunction against the exhibition of obscene motion picture films. Thereafter (and in the trial court below) the Orange County Superior Court has refused to apply that rule of law, even though the parties are the same.

3. Although all of the films which

have been adjudicated in the court trials to date (51 films) have been adjudicated to be hard-core pornography (see Resolution of Lincoln Board of Directors at page 16, supra), the City of Santa Ana has been denied attorney's fees in each of such cases.

4. In the single case (the second trial) which was tried on a final injunction, without a hearing on a preliminary injunction at the time the film was being exhibited and could be reached by subpoena, the persons then in possession of such films refused to produce the copy at the trial under the subpoena, the People were non-suited, and the same trial judge who denied the City its attorney fees in two other successful cases, granted attorney's fees to the theater.

5. The California Supreme Court

ruled that under the rulings of this Court, even though it were established by proof that the theater showed nothing but hard-core films for the 11 year period, the Mitchell Brothers Theatre real estate could not be abated because of this Court's restrictive rulings against prior restraint. This Court has compounded that ruling by refusing to consider the issue of a closure in that context.

The rules of law thus established in the above California litigation are that: (1) the People are not entitled to a hearing on a preliminary injunction or order to show cause, at which time they would have an opportunity to subpoena the film print; (2) the People must try the issue of public nuisance at a trial on a final injunction, in which event the possessor of the print need

not produce the print because of self-incrimination, and the People stand the risk of an award of attorney's fees to the theater if the print is not produced; (3) the People stand the risk of not being awarded attorney's fees if they win at the trial on the final injunction and thus have paid for an expensive lawsuit for which there can be no restitution of expenses; and (4) the People undertake the risk of an imposition of sanctions if they seek to change the rules of law expressed above.

CONCLUSION

This Court should hold that the Petitioner herein has standing in this Court as an intervening Petitioner, that the issues of law which are recited herein have merit, that the Petition should be granted, and that due process

requires that an opportunity be afforded the Petitioner to consider whether such issues (including the award of sanctions) should be heard by the California Supreme Court by Writ of Review. Anything short of this establishes a patently unconstitutional judicial practice which is condemned by Pulliam v. Allen, 466 U.S. 522, 524, 80 L.Ed.2d 565, 568 (1984), and constitutes a denial of due process of law and of access to the courts. Rylands v. Shapiro, 708 F.2d 967 (5th Cir., 1983).

DATED: March 20, 1990

Respectfully submitted,

JAMES J. CLANCY
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 1990, 40 copies of the within Petition for Leave To Intervene And Petition For Writ of Certiorari To The Supreme Court of California were deposited in the United States Post Office in Sun Valley, California with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below listed party to the proceedings and that all parties required to be served have been served.

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For Petitioners

APPENDIX A

Opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division Three, in the Consolidated Appeal of Case No. G005740 and G006495 Entitled Lincoln Savings and Loan Ass'n. v. Cinema 7, Inc., et al., filed August 24, 1989.....A-1 through A-50
(Reference: Petition at page 3.)

Order of the California Supreme Court, Filed on November 21, 1989, Denying the Petition for Review and the Request for an Order Directing Publication of the Opinion.....A-51
(Reference: Petition at pages 3-4.)

Order of the California Supreme Court, Filed on December 20, 1989, Denying the Motions, Applications, and/or Petitions of James J. Clancy.....A-52
(Reference: Petition at pages 3-4.)

APPENDIX A

LINCOLN SAVINGS AND LOAN ASSOCIATION, Plaintiff and Appellant,	)	G005740 (Consol. with G006495) (Super. Ct. No.51-87-55)
v.	)	
	)	OPINION
CINEMA 7, INC., et al.,	)	
Defendants and Respondents.	)	

APPEAL from judgment of dismissal, and orders sustaining demurrer without leave to amend, denying preliminary injunction and awarding attorney's fees and sanctions, from the Superior Court of Orange County, Gary L. Taylor, Judge and Julian Cimbaluk, Temporary Judge. (Pursuant to Cal. Const., art. VI, section 21.) Order sustaining demurrer dismissed. Order awarding attorney's fees reversed. Judgment and orders denying preliminary injunctions and granting sanctions affirmed. Defendants' motion for partial dismissal

denied. Philip Barbaro, Jr. and James J. Clancy for Plaintiff and Appellant.

Law Offices of Thomas Steel and Stuart Buckley for Defendants and Respondents.

* * *

Plaintiff Lincoln Savings and Loan Association (Lincoln) brought this actions to bar defendants Cinema 7, Inc. (Cinema 7) and Philip Brady (Brady) from operating a movie theater allegedly showing obscene films. The lower court denied Lincoln's motions for preliminary injunctions, sustained defendants' demurrer to the amended complaint without leave to amend, dismissed the action, and subsequently granted defendants' motion seeking attorney's fees under Code of Civil Procedure section 1021.5 and sanctions pursuant to

Code of Civil Procedure section 128.5.

Two appeals have been consolidated for review. In Case No. G005740, Lincoln appeals from the judgment of dismissal and orders sustaining the demurrer and denying the preliminary injunction motions. Defendants have moved for a partial dismissal of this appeal. We deny defendants' motion, dismiss the appeal from the order sustaining the demurrer, and otherwise affirm.

In Case No. G006495, Lincoln appeals from the post-judgment order awarding attorney's fees and sanctions. We reverse the fee award under section 1021.5, but affirm the lower court's imposition of sanctions.

FACTS

I. PROCEDURAL HISTORY

This lawsuit is an outgrowth of litigation between the City of Santa Ana and Mitchell Brothers Santa Ana Theater. Between November 1976 and March 1987 the city filed 46 lawsuits against the theater, its owners and others seeking to enjoin the exhibition of allegedly obscene films and close the theater.[1] On March 16, 1987, the parties to that litigation executed a written settlement

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[1] A partial history of that litigation appears in the following decisions: People ex rel. Cooper v. Mitchell Brothers Santa Ana Theater (1985) 165 Cal.App.3d 378; People ex rel. Cooper v. Mitchell Brothers Santa Ana Theater (1982) 128 Cal.App.3d 937; People ex rel. Gow v. Mitchell Brothers Santa Ana Theater (1981) 118 Cal.App.3d 863; People ex rel. Gow v. Mitchell Brothers Theater (1981) 114 Cal.App.3d 923; People ex rel. Gow v. Mitchell Brothers Santa Ana Theater (1980) 101 Cal.App.3d 296; Cooper v. Mitchell Brothers (1981) 454 U.S. 90.

of it and dismissed all pending actions with prejudice.

Lincoln commenced this action March 26, 1987. On April 23, it filed a first amended complaint. Shortly thereafter, Lincoln filed a motion for preliminary injunction seeking to enjoin defendants from exhibiting 57 named films and similar movies, and to prohibit them from removing the films from the court's jurisdiction. Lincoln served two subpoenas duces tecum on defendants ordering them to produce six named films at the hearing on the preliminary injunction.

On May 11, Lincoln made an ex parte application for an order to show cause seeking to temporarily enjoin the exhibition of three additional films then appearing at the theater. The court denied Lincoln's application.

Lincoln filed a second motion for preliminary injunction to enjoin exhibition of these films and set it for hearing on the same date as the first request. It served defendants with notices directing them to personally appear at the preliminary injunction hearing and to produce prints of 55 films and 12 film previews allegedly exhibited at the theater between December 31, 1986 and May 6, 1987. (Code Civ. Proc., section 1987; Evid. Code, section 1503.)

Defendants responded with a motion to quash the subpoenas, a demurrer to the amended complaint, and written opposition to the preliminary injunction motions. Along with the demurrer, defendants submitted a request for judicial notice that included documents filed in the city's litigation.

The lower court denied the preliminary injunction motions. It assumed Lincoln could establish standing to sue and produce relevant admissible evidence showing the films were obscene. But, since little chance existed defendants would re-exhibit any of the films before trial, the court concluded Lincoln failed to show irreparable harm. In addition, it held Lincoln could not use a preliminary injunction as a means of producing and preserving evidence for trial.

On July 2, the court sustained defendants' demurrer to all causes of action without leave to amend. A judgment of dismissal was entered. Lincoln timely appealed from the judgment and orders denying the motions for preliminary injunction and

sustaining defendants' demurrer.[2]

Defendants filed a motion seeking attorney's fees and sanctions. The lower court held a hearing on it December 3. On January 15, 1988, the court issued a written order awarding defendants $12,778.84 in attorney's fees under Code of Civil Procedure section 1021.5, and an equal amount as sanctions under Code of Civil Procedure section 128.5. Lincoln also timely appealed from this ruling.

II. THE FIRST AMENDED COMPLAINT

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[2] Lincoln filed a motion for leave to file amendments to the first amended complaint June 11, 1987. Before it was heard, the lower court ruled on the demurrer and dismissed the action. On appeal, Lincoln does not rely on the proposed amendments to establish error, and they would not have changed our decision.

The complaint alleges four causes of action. The first and second counts seek to abate and enjoin the operation of the theater and exhibition of films on the theory defendants' conduct constitutes a public nuisance.

Lincoln alleges it maintains a branch office across the street from the Mitchell Brothers Santa Ana Theater. Cinema 7, Inc. owns and operates the theater, and Brady manages it. From November 28, 1975 to the present, defendants have exhibited films and film previews at the theater that are obscene as defined by California law. (Pen. Code, section 311, subd. (a).) Attached to the amended complaint is a 41 page exhibit purportedly listing the name and date of exhibition of each film shown at the theater between November 28, 1975 and January 14, 1987. The film previews

shown by defendants promote the exhibition of obscene films. (Pen. Code, section 311.5) This activity establishes the theater premises as a continuing public nuisance.

Paragraph 19 of the amended complaint alleges defendants' course of conduct has: (1) Caused personal offense, outrage and emotional distress; (2) subjected Lincoln's officers, employees and customers to illegal, immoral, corrupting and degrading influences; (3) attracted criminal elements and caused an increase in sex crimes; (4) polluted the moral environment and eroded public morality; (5) increased the probability of transmitting sexually related diseases and causing illegitimate births; (6) damaged the reputation of Lincoln, the City of Santa Ana and the local

community; and (7) caused a decrease in real estate market values.

Lincoln asserts defendants' exhibition of films constitutes a public nuisance per se. Referring to the city's settlement with the theater, Lincoln claims Santa Ana abandoned its responsibility to seek abatement of defendants' activity.

The foregoing allegations are incorporated into the amended complaint's remaining causes of action. In the third count, Lincoln seeks an injunction restraining defendants from possessing, distributing, and exhibiting the films, claiming this activity constitutes an unlawful business practice.

The fourth cause of action requests a declaration that Santa Ana Municipal Code sections 12-101 to 12-106 are

constitutional and apply to defendants' theater. The ordinances define any place where obscene films are publicly exhibited on a regular basis as a public nuisance per se, permit the city council to declare the premises a nuisance, and direct the city attorney to commend proceedings to revoke the business's licenses and permits, restrain its activity, seize the films, and recover any financial gain received from exhibiting the movies.

III. HEARING AND RULING ON DEMURRER

Defendants' generally demurred to all four causes of action. At the hearing on the demurrer, the court tentatively ordered it sustained with leave to amend and explained the basis for the ruling. Lincoln's counsel told the court is was unable to amend and

suggested the demurrer be sustained without leave. The court agreed to do so.

On the first, second, and fourth causes of action the court held Lincoln failed to state facts establishing it had standing to maintain an action for public nuisance or declaratory relief. the fourth cause of action also sought an advisory opinion.

On the third cause of action the court ruled: (1) Lincoln did not allege sufficient facts to permit a private party to enjoin an unfair business practice; (2) the cause of action was not brought on behalf of the public; (3) due to the city's dismissal of its lawsuits, Lincoln's action could not be brought on the public's behalf; and (4) Lincoln did not allege a false advertising claim.

IV. HEARING AND RULING ON POST-JUDGMENT MOTION

Defendants sought fees under Code of Civil Procedure section 1021.5 arguing their defense vindicated constitutional and procedural rights related to the authority of a private party to censor the exhibition of films. they also argued the action was frivolous and requested sanctions under Code of Civil Procedure section 128.5.

After a hearing, the lower court granted the motion. It concluded defendants' efforts resulted in the defeat of a censorship program and reaffirmed the principle that a private party generally cannot maintain a public nuisance action.

The court awarded defendants sanctions in the form of attorney's fees for the following reasons: (1)

Lincoln's action sought to go behind the city's settlement with the theater and harass defendants; (2) the lawsuit did not attempt to expand the boundaries of the law in an area where it was in a stat of flux; (3) Lincoln requested relief beyond that to which even a proper party would be entitled; and (4) its motions for a preliminary injunction constituted an improper attempt to circumvent normal discovery procedures.

DISCUSSION

I. INTRODUCTION

First, we consider the lower court's ruling on defendants' demurrer.

The test is whether the amended complaint states a cause of action even though "the facts may not be clearly stated, or may be intermingled with a

statement of other fact irrelevant to the cause of action show or although the plaintiff may demand relief to which he is not entitled under the facts alleged." (Matteson v. Wagoner (1905) 147 Cal. 739, 742.)

In reviewing the amended complaint, we are not limited to Lincoln's theories of recovery. The question is whether the complaint states a cause of action under any legal theory. (Barquis v. Merchants Collection Assn. (1972) 7 Cal.3d 94, 103; Campbell v. Veith (1953) 121 Cal.App.2d 729, 732.) All material facts alleged in the complaint are assumed to be true except: (1) Contentions deductions or conclusions of fact or law; and (20 allegations contradicted by judicially noticed facts. (Gruenberg v. Aetna Ins. Co. (1973) 9 Cal.3d 566, 572; B & P

Development Corp. v. City of Saratoga (1986) 185 Cal.App.3d 949, 953.)

If a plaintiff declines an opportunity to amend his complaint, it is proper to sustain the demurrer without leave to amend. (Irwin v. City of Manhattan Beach (1966) 65 Cal.2d 13, 25.) On appeal, "it is presumed that the complaint states as strong a case as is possible." (Otworth v. Southern Pac. Transportation Co. (1985) 166 Cal.App.3d 452, 457.)

An order sustaining a demurrer without leave to amend is not appealable. (Beazell v. Schrader (1963) 59 Cal.2d 577, 579-580; Kennedy v. Owen (1948) 85 Cal.App.2d 517, 519.) Therefore, we dismiss the appeal from the order sustaining defendants' demurrer. However, the propriety of the lower court's ruling on the demurrer is

presented by Lincoln's appeal from the judgment of dismissal. (Valvo v. University of Southern California (1977) 67 Cal.App.3d 887, 891-892.)

II. FIRST AND SECOND CAUSES OF ACTION

The lower court concluded Lincoln failed to allege facts permitting a private party to maintain a nuisance claim. Standing to sue is necessary to state a cause of action, and failure to state facts establishing it may be raised by a general demurrer. (Parker v. Bowron (1953) 40 Cal.2d 344, 351; Klopstock v Superior Court (1941) 17 Cal.2d 13, 18.)

A private party can maintain a public nuisance action where the defendant's conduct either causes special injury to the plaintiff or constitutes a private nuisance as to

him. (Civ. Code, section 3493; Code of Civ. Proc., section 731; Brown v. Petrolane, Inc. (1980) 102 Cal.App.3d 720, 725-726; Venuto v. Owens-Corning Fiberglass Corp. (1971) 22 Cal.App.3d 116, 123-124.) If defendant's conduct creates a public nuisance, plaintiff must allege injury "of a character different in kind from that suffered by the general public." (Venuto v. Owens-Corning Fiberglass Corp., supra, 22 Cal.App.3d at p. 124. Emphasis in original.) Injury differing only in degree from that suffered by others is not sufficient. (Id. at p. 124.) Where plaintiff seeks to maintain a private nuisance cause of action, he must allege "an injury to [his] private property, or to a private right incidental to such private property..." (Lind v. City of San Luis Obispo (1895) 109 Cal. 340,

344. See also Venuto v. Owens-Corning Fiberglass Corp., supra, 22 Cal.App.3d at pp. 124-125.)

Lincoln contends the following allegations give it standing to maintain a nuisance action: (1) Defendants' conduct causes moral harm to the public; (2) the theater's operation depreciates property values; and (3) the theater is located close to plaintiff's branch office. We conclude Lincoln's arguments are without merit.

If the first allegation is true, the injury suffered by Lincoln differs only in degree rather than kind from that suffered by the remainder of the community. (Brown v. Petrolane, Inc., supra., 102 Cal.App.3d at pp. 726-727; Venuto v. Owens-Corning Fiberglass Corp., supra., 22 Cal.App.3d at p. 125.)

The allegation that defendant's

conduct depreciates property values is not sufficient to support the cause of action. (Siskiyou Lumber etc. Co. v. Rostel (1898 121 Cal. 511, 513; McCloskey v. Kreling (1888) 76 Cal. 511, 512-513; Bigley v. Nunan (1879) 53 Cal. 403, 404; Severy v. C.P.R.R. Co. (1985) 51 Cal. 194, 197; Biber v. O'Brien (1934) 138 Cal.App. 353, 361. See also People v. Oliver (1948) 86 Cal.App.2d 168 and Brown v. Arbuckle (1948) 88 Cal.App.2d 258 [Holding depreciation in property values caused by construction of a public or commercial structure in a residential area is a relevant factor in determining whether a nuisance exists].)

Cases have held that, in certain circumstances, a person living near activity producing sights, sounds or smells invading the quiet and peaceful enjoyment of his property may maintain a

nuisance action either because it constitutes a private nuisance or causes him special injury. (Johnson v. V.D. Reduction Co. (1917) 175 Cal. 63, 66 [odors and smells from operation of a hog farm feeding on city garbage; private nuisance]; Fisher v. Zumwalt (1900) 128 Cal. 493, 495-499 [noxious gas from creamery; private nuisance]; Wade v. Campbell (1962) 200 Cal.App.2d 54, 59-60 [dust, offensive odors and sounds from operation of a dairy; public nuisance]; Gould & Kane, Inc. v. Valterza (1909) 9 Cal.App. 773, 778 [sights and sounds from an adjoining building used for prostitution; private nuisance].)

Gould & Kane, Inc. v. Valterza, supra, notes a distinction must be drawn "between injury to property rights as distinguished from abstract rights."

(37 Cal.App.2d at p. 681.) The gravaman of Lincoln's complaint is that the sexually explicit nature of the films exhibited at defendants' theater morally harms the public. Lincoln does not allege defendants operate an outdoor theater subjecting nearby residents to the sights and sounds of the exhibited films.

Lincoln presents several additional arguments asserting it has stated a cause of action even though the foregoing pleading requirements were not satisfied. First, Lincoln contends defendants' exhibition of obscene films constitutes a nuisance per se. in Farmer v. Behmer, supra, the court held a house of prostitution was a nuisance per se, but upheld a judgment for plaintiff by finding he sufficiently pleaded and proved defendant's activity

constituted a private nuisance. (9 Cal.App. at p. 778.)

Next, Lincoln tries to distinguish this lawsuit from other nuisance actions contending it seeks only injunctive relief and not damages. However, the same was true in Johnson v. V.D. Reduction Co., supra, 37 Cal.App.2d 678.

Lincoln claims Santa Ana's "abandonment" of its lawsuits against the theater provides a basis for a private party to maintain a nuisance claim on the city's behalf. The cases cited by Lincoln to support this contention are inapposite.

Baker v. Burbank-Glendale-Pasadena Airport Authority (1985) 39 Cal.3d 862 involved an action by residents living near an airport. The issue presented was whether plaintiffs could treat the conduct as a continuing nuisance,

thereby avoiding a statute of limitations defense.

In Silver v. Watson (1972) 26 Cal.App.3d 905 a taxpayer sought to recover unpaid business taxers after the county declined to file suit. The court affirmed the dismissal of plaintiff's action because the county's decision not to sue was discretionary. In People ex Rel. Busch v. Projection Room Theater (1976) 17 Cal.3d 42, the Supreme Court held the state can enjoin the exhibition of obscene films as a public nuisance. But, in so ruling, the court also noted public officials do not have a mandatory duty to abate the exhibition of obscene matter. (Id. at p. 55.)

Lincoln's reliance on State ex. rel. Sullivan v. Phoenix Sav. Bank & Trust Co. (1948) 68 Ariz. 42, 198 P.2d 1018 and State ex. rel. Pizza v. Strope

(Ohio Mar. 10, 1989) C.A.No. L-88-045 (Motion for Stay granted May 12, 1989; 539 N.E.2d 164) is without merit. Both cases involved actions by the state, not private parties. Furthermore, nothing in either the language or history of Code of Civil Procedure section 1021.5 supports a conclusion it was intended to or does create a "private attorney general cause of action."

Finally, Lincoln requests we jettison the special injury requirement altogether. The sole authority cited for this proposition is the decision of a Florida intermediate appellate court (Save Sand Key, Inc. v. U.S. Steel Corp. (Fla. 1972) 281 So.2d 572) which Lincoln concedes was later overruled by the state supreme court. (U.S. Steel Corp. v. Save Sand Key, Inc. (Fla. 1974) 303 So.2d 9.) In California, the special

injury requirement is mandated both by statute (Civ. Code, section 3493) and decisional law (Fisher v. Zumwalt, supra, 128 Cal. 493, 495-499). We are not authorized to eliminate it. (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.)

Therefore, we conclude Lincoln has failed to allege facts sufficient to permit it to maintain the first and second causes of action.

III. THIRD CAUSE OF ACTION

Lincoln contends it has standing to maintain the third cause of action under Business and Professions Code section 17535. Defendants argue the amended complaint does not allege facts establishing false advertising by them.

Defendants' argument is clearly correct. The amended complaint fails to

allege defendants engaged in false advertising. In fact, it contradicts this theory. Paragraph 16 of the amended complaint states: "The exhibition of the previews of the motion picture films...,promotes the exhibition of obscene 'motion pictures'...which are represented and held out to the public by defendants to be obscene...." Therefore, Lincoln's reliance on Business and Professions Code sections 17500 and 17535 is without merit.

However, we must also determine whether the amended complaint states a cause of action on any theory. Arguably, Lincoln could seek injunctive relief for unfair competition. (Bus. & Prof. Code, section 17200 et. seq.) In People v. E.W.A.P., Inc. (1980) 106 Cal.App.3d 315, 318-321, the court upheld the state's right to maintain an

action for unfair competition against the operators of a bookstore selling allegedly obscene magazines and films. "The Legislature has determined that trafficking in obscene matter is prohibited. When engaged in as a business practice, it is an unlawful business practice. It is not necessary for the People additionally to allege that it is anticompetitive or harmful to the consumer of such products." (Id. at p. 319, fn. omitted.)

In sustaining the demurrer to the third cause of action the lower court, in part, held Lincoln failed to state an unfair competition claim because it did not asset this count on behalf of the general public. We agree. (See Stoiber v. Honeychuck (1980) 101 Cal.App.3d 903, 927-928. Compare Hernandez v. Atlantic Finance Co. (1980) 105 Cal.App.3d 65,

72-73.)

Generally, an action "must be prosecuted in the name of the real party in interest." (Code Civ. Proc., section 367.) One exception to this rule permits a "person expressly authorized by statute" to sue. (Code Civ. Proc., section 369. See 4 Witkin, Cal. Procedure (3d ed. 1985) Pleading, section 124, pp. 158-159.) Business and Professions Code section 17204 states "any person acting for the interests of itself, its members or the general public" may seek an injunction against unfair business practices. (Emphasis added.)

Lincoln's request for attorney's fees does not transpose this cause of action into one brought on behalf of the public. The prayer is not part of the cause of action. (4 Witkin, Cal.

Procedure (3d ed. 1985) Pleading, section 447, p. 491.) A request for attorney's fees under Code of Civil Procedure section 1021.5 does not create a new cause of action. It is a collateral matter ancillary to the main cause. (Maria P. v. Riles (1987) 43 Cal.3d 1281, 1289.) We note Lincoln was given the opportunity to further amend the complaint, but declined to exercise it.

Lincoln's reliance on Consumers Union of United States, Inc. v. Fisher Development, Inc. (1989) 208 Cal.App,.3d 1433 is similarly unavailing. That case involved an injunctive relief action alleging a violation of the Unruh Civil Rights Act (Civ. Code, section 51 et seq.). The issue was whether plaintiff had standing to sue under Business & Professions Code section 17204 even

though it was not a "person aggrieved" as required by Civil Code section 52, subdivision (c). In Consumers Union, the plaintiff brought its action on behalf of the public. Here, Lincoln did not.

Finally, by a post-argument letter brief, Lincoln argues it is entitled to maintain a cause of action under Business & Professions Code section 17204 on the theory it constitutes a qui tam action. This contention is also without merit.

Sanders v. Pacific Gas & Electric Co. (1975) 53 Cal.App.3d 661 explained the nature of a qui tam action as follows: "By definition, qui tam rights have never existed without statutory authorization. as a result, courts have been required to develop criteria to determine whether a given statute in

fact authorizes qui tam enforcement. Traditionally, the requirements for enforcement by a citizen in a qui tam action have been (1) that the statute exacts a penalty; (2) that part of the penalty be paid to the informer; and (3) that, in some way, the informer be authorized to bring suit to recover the penalty." (Ibid. at p. 671.)

Under Sanders, Lincoln cannot maintain a qui tam action. Business & Professions Code section 17204 permits a private party to seek only injunctive relief. Thus, the requirement that the statute authorize the informer to recover a penalty is not satisfied.

Accordingly, the lower court properly sustained defendants' demurrer to the third cause of action.

IV. FOURTH CAUSE OF ACTION

The lower court sustained the demurrer to the fourth cause of action because it requested an advisory opinion on the validity of the city's ordinances, and lacked standing to seek declaratory relief. On appeal, Lincoln reasserts its right to have the ordinances' constitutional validity judicially determined. Defendants argue the lower court properly ruled on this cause of action. We agree.

Code of Civil Procedure section 1060 states a party "who desires a declaration of his rights or duties with respect to another,...may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action in the superior court...for a declaration of his rights and duties in the premises."

"[T]he controversy must be of a

character which admits of specific and conclusive relief by judgment within the field of judicial determination, as distinguished from an advisory opinion upon a particular or hypothetical state of facts. The judgment must decree, and not suggest, what the parties may or may not do. While ordinances and statutes are inherently proper subjects of declaratory relief, yet a declaratory judgment may not be rendered in respect to them in disregard of the customary limitations upon the granting of such relief." (Monahan v. Dept. of Water & Power (1941) 48 Cal.App.2d 746, 751 (disapproved on other grounds in Bekiaris v. Board of Education (1972) 6 Cal.3d 575, 587-588, fn. 7). See also Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal.3d 110, 117; Sherwin v. Department of Social Services

(1985) 173 Cal.App.3d 52, 57-58; Zetterberg v. State Dept. of Public Health (1974) 43 Cal.App.3d 657, 661-662.)

Santa Ana Municipal Code sections 12-101 et seq. are very similar to the ordinance considered in People ex Rel. Camil v. Buena Vista Cinema (1976) 57 Cal.App.3d 497. Camil held the ordinance before it constituted "a local internal mechanism for determining when the city will institute judicial proceedings to abate a public nuisance." (Id. at p. 503).

The same is true here. Santa Ana's ordinances do not provide for private enforcement. The city council's only declaration of a nuisance, if any, occurred before Santa Ana settled its litigation against the theater. Between the parties to this lawsuit, a

declaration of rights would constitute merely an advisory opinion. Therefore, we conclude the lower court did not err by sustaining the demurrer to the fourth cause of action.

Our determination the lower court properly ruled on defendants' demurrer to the first amended complaint is dispositive of the issues raised in Case No. G005740. Thus, it is unnecessary for us to consider the additional issues relating to the denial of Lincoln's preliminary injunction requests and defendants' motion for a partial dismissal.

V. AWARD OF ATTORNEY'S FEES

Lincoln contends the lower court erroneously awarded fees under section 1021.5 arguing defendants achieved a procedural victory that defeated an

otherwise proper attempt to enforce obscenity laws, defendants failed to establish the statutory requirements for an award, and the lower court abused its equitable discretion in granting the request.

Code of Civil Procedure section 1021.5 states: "Upon motion, a court may award attorney's fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred n the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be

paid out of the recovery, if any."

"The trial court in its discretion 'must realistically assess the litigation and determine, from a practical perspective, whether or not the action served to vindicate an important right so as to justify an attorney fee award' under section 1021.5. [Citation.] The trial court's decision on this issue should be reversed only if there has been a prejudicial abuse of discretion. '"'To be entitled to relief on appeal...it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice...'"' [Citation.]" (Maria P. v. Riles, supra, 43 Cal.3d 1281, 1291. See also Phipps v. Saddleback Valley Unified School Dist. (1988) 204 Cal.App.3d 1110, 1123.)

Since section 1021.5 refers to the "successful party," an award may be made to a defendant if the statute's requirements are otherwise met. (County of San Luis Obispo v. Abalone Alliance (1986) 178 Cal.App.3d 848, 869.)

We conclude defendants achieved only a procedural victory, and thus failed to establish all of the necessary elements for an award of attorney's fees under section 1021.5. In Parker v. Bowron, supra, 40 Cal.2d 344, the Supreme Court stated: "Where the complaint states a cause of action in someone, but not in the plaintiff, a general demurrer for failure to state a cause of action will be sustained." (Ibid. at p. 351. See also Klopstock v. Superior Court, supra, 17 Cal.2d 13, 19.)

Defendants' success on a

preliminary issue does not, of course, bar recovery of fees under section 1021.5. (Woodland Hills Residence Assn., Inc. v. City Council (1979) 23 Cal.3d 917, 938.) But "the fact that a plaintiff prevails on a 'technical' preliminary issue does not necessarily demonstrate that his additional claims have sufficient merit to warrant the conclusion that the action served to vindicate an important right". (Ibid.)

The nature of defendant's activity and the constitutional issues presented by Lincoln's attempt to enjoin it were never litigated. At the preliminary injunction hearing, the court assumed the films exhibited were obscene. It denied relief solely because none of them would be re-exhibited before trial.

The demurrer did not attack the amended complaint's allegations

respecting the nature of the films exhibited at the theater. It challenged Lincoln's right to maintain this action. The right of a proper party to enjoin the exhibition of obscene movies is well established. (People ex Rel. Busch v. Projection Room Theater, supra, 17 Cal.3d 42; People ex Rel. Gow v. Mitchell Brothers' Santa Ana Theater, supra, 101 Cal.App.3d 296, 301-305; In re Ward (1978) 82 Cal.App.3d 981, 984, 989.) But the nature of defendants' activity was collateral to the issues presented and litigated in the lower court.

Neither did defendants satisfy the significant benefit requirement. In Woodland Hills Residence Assn., Inc. v. City Council, supra, 23 Cal.3d at pp. 939-940 the court stated: "[T]he Legislature contemplated that in

adjudicating a motion for attorney fees under section 1021.5, a trial court would determine the significance of the benefit, as well as the size of the class receiving the benefit, from a realistic assessment, in light of all the pertinent circumstances, of the gains which have resulted in a particular case. [Citation.]" The dismissal vindicated only defendants' right to continue operating the theater as before. (See Pacific Legal Foundation v. California Coastal Comm. (1982) 33 Cal.3d 158, 167.)

The cases defendants cite to support the fee award are distinguishable. People v. Freeman (1988) 46 Cal.3d 419 and People v. Glaze (1980) 27 Cal.3d 841 involved criminal prosecutions challenged on constitutional grounds. In Press v.

Lucky Stores, Inc. (1983) 34 Cal.3d 311 plaintiffs successfully enjoined a retail business from blocking efforts to seek signatures for a ballot initiative from shopping center patrons. EWAP, Inc., City of Ontario (1986) 177 Cal.App.3d 1108 and BSA, Inc. v. King County (9th Cir. 1986) 804 F.2d 1104 considered fee awards made under a federal civil rights statute. People ex. Rel. Cooper v. Mitchell Brothers Santa Ana Theater, supra, 165 Cal.App.3d 378 affirmed an order denying a public entity's fee request under section 1021.5.

Therefore, we conclude the lower court erred by awarding defendants attorney's fee under Code of Civil Procedure section 1021.5.

VI. AWARD OF SANCTIONS

Finally, Lincoln challenges the lower court's award of sanctions in the form of attorney's fees under Code of Civil Procedure section 128.5. Lincoln argues its lawsuit was not frivolous. We conclude the lower court properly awarded sanctions.

Section 128.5 permits a trial court to award a party "reasonable expenses, including attorney's fees, incurred...as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." The phrase "actions or tactics" includes "the making or opposing of motions or the filing and service of a complaint...." (Code Civ. Proc., section 128.5, subd. (b)(1).) The term "frivolous" is defined as "(A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party."

(Code Civ. Proc., section 128.5, subd. (b)(2).)

An award of sanctions under section 128.5 will be reversed only where the record shows an abuse of discretion. (Leiserson v. City of San Diego (1988) 202 Cal.App.3d 725, 739; Luke v. Baldwin-United Corp. (1985) 167 Cal.App.3d 664, 667-668.) "Where the issue on appeal is whether the trial court has abused its discretion, the showing necessary to reverse the trial court is insufficient if it presents facts which merely afford an opportunity for a different opinion...." (Winick Corp. v. county Sanitation Dist. No. 21 (1986) 185 Cal.App.3d 1170, 1176.)

Lincoln argues the evidence establishes defendants were exhibiting obscene movies, and it reasonably relied on the trial court's previous orders

overruling demurrers to the same causes of action pleaded in the city's lawsuits against the theater. These contentions miss the point. The distinguishing factor between this case and Santa Ana's litigation is the status of the party bringing suit. The primary issue litigated was Lincoln's standing to sue.

Next, Lincoln claims it reasonably relied on People ex Rel. Busch v. Projection Room Theater, supra, 17 Cal.3d 42, arguing the city's "abandonment" of the cause provided standing to maintain suit. This argument is also without merit. In Busch, the Supreme Court held a public entity's decision to maintain a nuisance action against a theater allegedly exhibiting obscene movies fell within its discretionary authority.

More importantly, Lincoln fails to

challenge the lower court's finding it brought this action to harass defendants and avoid the city's settlement with the theater. The record clearly supports this conclusion. (Appl v. Lee Swett Livestock Co. (1987) 192 Cal.App.3d 466, 475-476.) The evidence reflects Lincoln financially supported Santa Ana's litigation. Although requested to join that litigation, Lincoln declined because it doubted standing to do so existed. Lincoln changed its mind only after Santa Ana settled.

Lincoln's amended complaint sought relief clearly barred by present case law. It sought injunctive relief previously denied to Santa Ana. The lower court found Lincoln's efforts in seeking a preliminary injunction were intended to circumvent normal discovery procedures.

Therefore, we conclude the lower court did not abuse its discretion by awarding defendants sanctions under Code of Civil Procedure section 128.5.

CONCLUSION

The appeal from the order sustaining defendants' demurrer without leave to amend is dismissed. The judgment of dismissal and orders denying Lincoln's preliminary injunction motions are affirmed. The post-judgment order awarding defendants attorney's fees is reversed as to the award made under Code of Civil Procedure section 1021.5. The award of sanctions under Code of Civil Procedure section 128.5 is affirmed. Defendants' motion for a partial dismissal of the appeal is denied on the ground it is moot.

/s/ MOORE
MOORE, J.

WE CONCUR:

/s/ CROSBY
CROSBY, Acting P.J.

/s/ WALLIN
WALLIN, J.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Fourth Appellate District, Division

Three, No. G005740

S012329

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN BANK

LINCOLN SAVINGS AND LOAN ASSOCIATION
Appellant
v.

CINEMA 7, INCORPORATED
Respondents

And Companion Case

"[Supreme Court
FILED 11/21/89
Robert Wanduff
Clerk
_____
Deputy]"

Appellant's petition for review DENIED. The request for an order directing publication of the opinion is denied.

/s/ LUCAS

Chief Justice

No. 4/3 G006495 - S012329

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN BANK

LINCOLN SAVINGS AND LOAN ASSOCIATION

v.

CINEMA 7, INCORPORATED

"[Supreme Court FILED 12/20/89 Robert Wanduff Clerk /s/ BW Deputy]"

Upon the request for clarification of order by James Clancy, this Court's order of November 21, 1989 is hereby modified to provide as follows: "The motions, applications, and/or petitions of James Clancy and each of them are DENIED. The request for an order directing publication of the opinion is denied."

/s/

Chief Justice